SUPREME COURT, U.S.

FILED

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In The

Supreme Court of the United States

October Term, 1970

No. 1268

[redacted],

Petitioner,

vs.

[redacted],

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF [redacted]

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In The

Supreme Court of the United States

October Term, 1970

No.

[redacted], Inc.,

Petitioner,

vs.

[redacted],

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The Petitioner, [redacted], Inc., prays that Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Illinois rendered in these proceedings on September 28, 1970. A timely petition for rehearing was filed and was denied on December 3, 1970.

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois reported as ____ Ill. 2d ____; 262 N.E. 2d 630, appears in Appendix A, pages 1a-4a. The order of the trial court, from which this appeal was originally taken, appears in Appendix B, pages 5a-6a. The order denying the petition for rehearing appears in Appendix D, page 13a.

JURISDICTION.

The opinion and judgment of the Illinois Supreme Court was entered on September 29, 1970 and a timely petition for rehearing was denied on December 3, 1970. Jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. After property has been sold at a tax sale, can a state, through legislative means, including eminent domain, change the term of the purchaser's sale and require a redemption on different terms and different conditions than that which was in effect when the property was sold, without violation of Article I, Sec. 10 of the Constitution of the United States?
2. Also, if property is condemned by eminent domain after it has been sold at a tax sale but prior to the expiration of the redemption period, and no redemption is made, who is entitled to the eminent domain award?

STATUTES INVOLVED.

This case involves Article I Section 10 of the Constitution of the United States and Sections 263 and 266 of the Illinois Revenue Act (Ill. Rev. Stat., 1967, Chap. 120, pars. 734 and 747). The pertinent portion of the Constitution and of said statutes are reprinted in Appendix C, pages 7a-12a.

STATEMENT OF THE CASE.

The Circuit Court of Cook County acquired complete jurisdiction over the property in question in an *in rem* proceeding pursuant to the County Collector's application for judgment and order of sale for nonpayment of 1963 general real estate taxes. No question has been raised as to the validity of these proceedings.

Pursuant to this initial court jurisdiction, on June 22, 1966 the subject property was sold to petitioner for the unpaid 1963 general real estate taxes. Under Illinois law (Ill. Rev. Stat., 1967, Chap. 120, par. 747) title does not finally pass until after a period of redemption expires and the tax purchaser complies with certain statutory prerequisites. Normally the period of redemption would have expired two years later or on June 22, 1968. However, pursuant to Section 263 of the Illinois Revenue Act (Ill. Rev. Stat., 1967, Chap. 120, par. 744), the period of redemption was extended to October 9, 1968.

On May 3, 1968, pursuant to an appropriate ordinance, the City of Chicago filed eminent domain proceedings against the subject property. On June 3, 1968, pursuant to Section 235 of the Revenue Act (Ill. Rev. Stat., 1967, Chap. 120, par. 747), petitioner filed a supplemental petition within the collector's application for judgment and order of sale for the 1963 general real estate taxes.

On September 9, 1968, a judgment was entered in the eminent domain proceedings which was paid on September 12, 1968 to the County Treasurer of Cook County in his capacity as a trustee of said funds pursuant to Section 14 of the Illinois Eminent Domain Act (Ill. Rev. Stat., 1967, Chap. 47, par. 14).

Because no redemption was made prior to the expiration of the period of redemption, on January 9, 1969, petitioner filed an application within the supplemental proceeding in the Circuit Court requesting entry of an order directing the issuance of a tax deed to transfer title to the property or its legal substitute, the monetary award in the hands of the county treasurer.

On March 10, 1969, respondents filed a motion to dismiss the application for a tax deed on the grounds that the City of Chicago had filed condemnation proceedings May 3, 1968 and, prior to the expiration of the period of redemption, the condemnation award was posted with the county treasurer.

On June 3, 1969, the trial court entered an order finding that the City of Chicago had instituted eminent domain proceedings and that prior to the expiration of the period of redemption the award for such eminent domain proceedings was deposited with the county treasurer; and that by reason thereof, petitioner was no

longer entitled to a tax deed. It thereupon sustained a motion to dismiss the application for a tax deed. The order further provides that petitioner must accept the redemption award some eight months after the period of redemption had expired and on different terms and different conditions than those that were present when it made its original purchase at the tax sale and received a certificate of purchase.

Thereafter, the decision of the trial court was appealed to the Illinois Appellate Court where it was alleged the trial court's order violated petitioner's rights as guaranteed by the constitution. After petitioner filed its brief in that court, pursuant to Illinois Supreme Court Rules 302 and 365, the Illinois Appellate Court found that a substantial issue was involved under the Constitution of the United States and transferred the case for hearing to the Illinois Supreme Court. (See record, pp. 1C, 1E and F and 1B)

The Illinois Supreme Court thereupon entered its decision, which is the basis of the instant Petition for Writ of Certiorari.

ARGUMENT.

I.

THE OPINION OF THE ILLINOIS SUPREME COURT WHICH SUSTAINS THE TRIAL COURT VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

The effect of the Illinois Supreme Court's opinion which affirmed the trial court's order is to allow eminent domain proceedings filed by the City of Chicago pursuant to an ordinance passed by the City Council by virtue of statutory authority (Ill. Rev. Stat., 1967, Chap. 24, par. 21-19) to force petitioner to accept a redemption after the period of redemption has expired, contrary to the statute in force at the time petitioner made its purchase, and on terms different than those in force at the time it made its purchase.

The imposition of such new requirements on petitioner, which were not in force at the time it made its purchase, violates petitioner's constitutional rights as guaranteed by Article I Section 10 of the Constitution of the United States. This Section provides *inter alia* as follows:

> "No state shall • • • pass any • • • Law impairing the obligations of contract • • •."

The original order of the trial court in this cause was first appealed to the Illinois Appellate Court. After petitioner's brief was filed, pursuant to Illinois Supreme Court, pursuant to Supreme Court Rule 365, this cause was transferred by order of the Appellate Court to the Supreme Court on the grounds that a substantial issue was involved under the Constitution of the United States.

The ruling of the Illinois Supreme Court never considered or passed on these constitutional issues and thus had the effect of denying petitioner its rights as guaranteed by the Constitution of the United States.

It is well established under Illinois Law that the certificate of purchase received by petitioner on June 22, 1966 as a result of its purchase of the property at a sale for non-payment of taxes amounts to a contract with the State which cannot thereafter be changed or modified. The basic Illinois case in this regard is *Bruce* v. *Schuyler*, 9 Ill. 221, which holds the rights secured from a tax sale are a contract between the State and the purchaser and cannot thereafter be constitutionally modified or changed.

This court also held the same in *Wood* v. *Lovett*, (1940), 313 U.S. 362 where this court said (page 369):

> "The Federal and State courts have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of the purchaser at a tax sale, accruing to him under laws in force at the time of his purchase, is void and impairing the obligation of contract."

Both of the above cases were just recently cited with approval by the Illinois Supreme Court in *Hogan* v. *Bleeker*, 29 Ill. 2d 181, 193 N.E. 2d 844, 849. The Illinois Supreme Court in the *Hogan* case again held that rights acquired by purchasers at statutory tax sales are protected by Federal and State constitutions prohibiting impairment of the obligations of contract.

Not only is the constitutional protection of contractual rights accorded tax purchasers recognized by this court, but it uniformly recognized by the text authorities (See 51 Am. Jur. 925 and 926 and 85 C.J.S. 163).

The constitutional protection against impairment of contracts also applies to acts of municipal governments where such power has been delegated to it by the state legislature.

In *Atlantic Coast Line* v. *Goldsboro*, 232 U.S. 548, this court said (page 555):

> "A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a State law within the meaning of the Federal Constitution. *New Orleans Water Works* v. *Louisiana Sugar Company*, 125 U.S. 18, 31; *Hamilton Gas Light Company* v. *Hamilton City*, 146 U.S. 258, 266; *St. Paul Gas Light Company* v. *St. Paul*, 181 U.S. 142, 148; *Northern Pacific Railway* v. *Duluth*, 208 U.S. 583, 590; *Grand Trunk Railway* v. *Indiana R.R. Comm.*, 221 U.S. 400, 403; *Ross* v. *Oregon*, 227 U.S. 150, 162.
>
> "Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the state, within the meanings of the pertinent clause * * * which confers jurisdiction on this court."

The Illinois Supreme Court similarly held in *Deneen* v. *Deneen*, 293 Ill. 454, 458.

Illinois Court decisions have uniformly held that eminent domain actions are in effect legislative actions. *City of Chicago* v. *Vaccarro*, 408 Ill. 587, 97 N.E. 2d 766, 771; *Forest Preserve District of Cook County* v. *Wilke*, 3 Ill. 2d 49, 119 N.E. 2d 734, 737; *City of Chicago* v. *Albert J. Schorsch Realty Co.*, ... Ill. App. 2d ....., 261 N.E. 2d 711, 715.

In order to commence the eminent domain proceedings in question in the instant case, the City of Chicago passed

an appropriate ordinance. It derived this power pursuant to express statutory authority given to the powers of the City Council by Section 21-19 of the Illinois Cities and Villages Act of 1941, as amended (Ill. Rev. Stat., 1967, Chap. 24, para. 21-19). Accordingly, the taking of the property by the City in the instant case had to comply with the constitutional limits of Article I, Section 10 of the Constitution of the United States. It could not alter contractual rights acquired by petitioner.

A.

Petitioner Acquired Certain Vested Rights When It Made Its Purchase.

When petitioner made its purchase at the Cook County Collector's annual tax sale and received a certificate of purchase therefore, it entered into a contract with the State for the following terms:

1. If a redemption were made within the time provided by law for such redemption and in the mode and manner prescribed by law, it would receive its purchase price plus the penalty prescribed by law.

2. If no redemption were made within the time and within the mode and manner prescribed by law and petitioners had complied with all the provisions of law (Sections 263 and 266 of the Illinois Revenue Act; Ill. Rev. Stats., 1967, Chap. 120, para. 744 and 747) entitling him to a tax deed, the court *shall* enter an order directing the issuance of a tax deed. The court may deny an application for tax deed *only* when the purchaser has failed to fulfill the requirements of Sections 263 and 266. No allegation has ever been made that petitioner failed to fulfill these requirements.

The Illinois law regarding these contractual terms is clear. Section 253 of the Illinois Revenue Act (Ill. Rev. Stat., 1965, Chap. 120, par. 734) provides that redemptions may be made solely by deposit of the redemption funds with the County Clerk either within two years of the date of sale, or if the period of redemption is extended, prior to the expiration of any extended period of redemption.

In interpreting this section of the Illinois Revenue Act, the Illinois courts of review have held that "any redemption attempted after the period specified in the statute or as the same may have been extended has expired is a nullity and of no legal effect" (*Petition of Short*, 99 Ill. App. 2d 143, 241 N.E. 2d 216, 217). The Illinois Supreme Court has held that the statutory right to redeem must be exercised *strictly* in accordance with the redemption statute (*Weiner* v. *Jobst*, 22 Ill. 2d 11, 174 N.E. 2d 561, 564; *Muir* v. *Mierwin*, 385 Ill. 273; *Weiner* v. *Eder*, 22 Ill. 2d 408).

Illinois courts of review have held that the court has no authority or jurisdiction to vary the terms of redemption (*People* v. *Thain*, 392 Ill. 592, 65 N.E. 2d 344, 346; *Depuy* v. *Morse*, 337 Ill. App. 1, 185 N.E. 2d 189, 190).

Section 266 of the Illinois Revenue Act (Ill. Rev. Stat., 1965, Chap. 120, par. 747) provides:

> "If the time of redemption expires and the real estate has not been redeemed from the sale and all taxes and special assessments which became and payable subsequent to the sale have been paid, and all forfeitures and sales which occurred subsequent to the sale have been redeemed and the notices required by law have been given and petitioner has complied with all the provisions of law entitling him

to a deed, the court *shall* enter an order directing the County Clerk upon production of the certificate of purchase and a certified copy of said order to issue to the purchaser or his assignee a tax deed." (emphasis added).

It is to be noted that the statute provides that if the tax deed petitioner has complied with all provisions of law the court *shall* order a tax deed to issue. This matter is not discretionary and the statute itself provides that the court may refuse "to enter an order directing the County Clerk to execute and deliver the tax deed" *solely* "because of the failure of the purchaser to fulfill any of the above provisions."

B.

Although Article I, Section 10 Of The Constitution Does Not Limit The Right Of The Eminent Domain, Such Action Merely Allows The Condemning Agency To Substitute Money For The Real Estate And Cannot Otherwise Contractual Rights.

It is conceded that the contractual protection against impairment of contract rights is not a limit on the power of eminent domain (*Cincinnati* v. *Louisville, etc. R. Co.* (1912) 223 U.S. 390). However, the right of eminent domain is solely the right of the government to substitute money in lieu of the real estate. The right of eminent domain affects only the relationship of the government to the parties interested in the property; it does not affect the respective rights of interested parties as among themselves. Nor can it abrogate the rights acquired by virtue of a tax sale.

In *Iselin* v. *C. W. Hunter Co.*, (1949), 173 F. 2d 388 the United States Court of Appeals (5th Circuit) said (p. 391):

> "Condemnation affects the rights of parties having interest in respect to the land taken only so far as necessary to assure the sovereign's title."

Also see *U. S.* v. *53⅓ Acres of Land, More or Less*, (1943), 139 F. 2d 264, 267 (2d Circuit).

Once an eminent domain award has been deposited with the treasurer, all rights previously attached to the real estate are now attached to the monetary award which stands in lieu of the real estate.

Upon payment of the award, although title to the property being condemned vests in the condemnor, all liens, taxes and encumbrances attached to the funds deposited to pay the award and leave the parties in the same position that they would have been prior to the condemnation award except the money stands in lieu of the property. See *City of Chicago* v. *Salinger*, 384 Ill. 515; *City of Chicago* v. *Gage*, 398 Ill. 232.

In *United States* v. *Certain Lands in Town of Hempstead, Nassau County, New York* (1942), 129 F. 2d 918, the United States Circuit Court of Appeals fully analyzed the entire problem and said (p. 919):

> "In the case at bar, the period of redemption had not expired before title vested in the United States, but we see no reason why this should necessitate a different result. Condemnation should not extend the statutory period of redemption any more than it should obliterate the effects of the expiration of the period of redemption. *Kaufman* v. *Valente*, 115 Conn. 428, 162 At. 693. The right to redeem from a tax sale can be exercised only in the manner permitted by statute. *Levy* v. *Newman*, 120 N.Y. 11, 23 N.E. 989; *People* v. *Moynahan*, 148 App. Div. 744, 746, 133 N.Y.S. 36. The condemnation award should affect

the rights of the parties having interest in respect to the land taken only so far as necessary to assure the sovereign's title. As between themselves the tax purchaser is privileged to remain quiescent and the former owner must make the payment specified in the statute if he would exercise his power of redemption * * *. Since the award takes the place of the land, it is reasonable to require the owner to redeem in order to obtain the award, just as he would have had to do to recover the land had the condemnation not intervened.

* * * * *

"It is urged by the United States as amicus curiae that the award when deposited becomes at law the property of the persons entitled to it (*United States v. Dunnington*, 146 U.S. 338, 351, 13 S. Court 79, 36 L. Ed. 996); that the county upon application to the court at any time thereafter could have received the amount required to redeem the tax sale certificate, and its delay should not enlarge its rights * * * exercise of the statutory power of redemption required payment to the county; had the former owners paid the money into court and notified the county to go and get it, this would not have been compliance with the statute, and no reason is apparent why the deposit by the United States should be more effective. * * * If equities between the parties are open to consideration, we think they lie with the county, which is privileged to remain quiescent until its inchoate title became absolute unless payment was made or tendered. As this did not occur, we think the tax deed was effective to carry the right to the entire award."

Under such circumstances, it would seem clear that when, as in the instant case, the City of Chicago condemns the property after it has been sold for nonpayment of real estate taxes that no redemption was made

within the time permitted by law, the tax purchaser is now entitled to the condemnation award, which as a matter of law, stands in lieu of the property.

C.

The Trial Court's Order Further Violates The Constitution In Requiring Petitioner To Accept A Redemption In A Mode And Manner Different Than That Prescribed By Statute.

The order appealed from in the instant case not only violates petitioner's constitutional rights for the reasons stated above, but further violates the constitutional proscription against impairment of contracts in requiring petitioner to accept a redemption well after the expiration of the period of redemption and in a mode different than that prescribed by Section 253 of the Illinois Revenue Act (Ill. Rev. Stat., 1965, Chap. 120, par. 734). As the Supreme Court of West Virginia said in 1933 in *Milkint* v. *McNeely*, 113 W. Va. 804, 169 S.E. 790:

> "• • • there is unanimity of authority that statutes purporting to extend the period of redemption of property sold as delinquent for nonpayment of taxes are unconstitutional and void as the sales made at the time of the enactment."

Also see *State ex rel Ceveringa* v. *Klein* (1933), 63 N.D. 514, 249 N.W. 118 and *In Re*: *Cranberry Creek Drainage District* (1930), 202 Wisc. 64, 231 N.W. 588).

It is, therefore, accordingly submitted that at the time of its tax purchase, a contract was entered into between tax purchaser and the State of Illinois. It is further submitted that since tax purchaser complied with all provisions required by statute entitling him to a tax deed, including the absence of a valid redemption within the time

provided by law, that for the reasons above stated, that the trial court's order amounted to a violation of petitioner's constitutional rights against infringement and contracts.

The Illinois Appellate Court found a Federal Constitutional question to be involved and therefore transferred the cause to be heard by the Illinois Supreme Court. However, the Supreme Court affirmed the trial court's order without so much as a mention of the Federal Constitutional question, thereby compounding the violation of your petitioner's rights as guaranteed by the United States Constitution.

II.

THERE IS A CONFLICT OF AUTHORITY BETWEEN CIRCUITS.

In *United States* v. *Certain Lands in Town of Hemsted, Nassau County, New York* (1942), 129 Fed. 2nd 918, the United States Court of Appeals for the Second Circuit stated as follows (919):

> "The question presented lies within a narrow compass; it is whether a purchaser at a tax sale who acquires a tax deed to the premises after title is vested in the United States by condemnation, is entitled to the entire award. In our opinion, the answer must be in the affirmative."

Four years later, the Circuit Court of Appeals for the Ninth Circuit reached an exactly opposite result. Thus in *Weber* v. *Wells, et al.*, 154 Fed. 2nd 1004, the Court said (page 1005):

> "The Tax Collector of the City and County of San Francisco, on July 14, 1942, in professing to sell the land to appellant, performed an idle act. The State

> of California at the time had no claim or lien upon the land whatsoever. It had nothing to sell when appellant attempted to buy; hence, he bought nothing. He argues that the sale to the Government did not extend the period of redemption. Quite true, but it left nothing to which a redemption period could relate or become effective. The entire picture was changed by the taking of title by the Government and out of the funds in the custody of the United States District Court was the State to receive the money due it for taxes, not from sale of an interest in the land. The persons entitled to the remainder of the fund after the lien is satisfied, are the owners at the time of the taking, in this case, the appellees, not appellant."

This court has never made a direct determination on the constitutional issues raised herein. In the only two cases in which Circuit Courts of Appeal have been called upon to review the issue of law, they have reached opposite and conflicting results. Consequently, in view of the Constitutional issues raised, this court should make a definitive ruling as to whether a purchaser at a tax sale who acquires a deed to the premises after the title has vested in the condemning authority is entitled to the award.

CONCLUSION.

The United States Supreme Court has, in the past, passed directly on the issue presently before the court. The Illinois Appellate Court found a constitutional issue to be involved and transferred the case to the Illinois Supreme Court. The Illinois Supreme Court totally failed to pass on this constitutional issue, thus effectively overruling the prior opinions of the United States Supreme Court.

It is respectfully submitted for the reasons stated in this brief that this court grant certiorari and resolve the constitutional problems set forth in this brief.

Respectfully submitted,

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APPENDIX "A"

Opinion and Judgment of the Illinois Supreme Court

Docket No. 42929—Agenda 55—May, 1970.
DELANO, INC., Appellant, *vs.* WALTER C. ARNOLD, Appellee.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

This case presents the narrow question of the relative rights of a tax purchaser, the appellant, Delano, Inc., and a property owner, the appellee, Walter C. Arnold, in an eminent domain award when the property that was sold for taxes is taken by an eminent domain proceeding which was commenced and completed during the period of redemption from the tax sale. The tax purchaser contends that it is entitled to the entire condemnation award.

The property in question was ordered sold for the nonpayment of real estate taxes for the year 1963. Since no bidders appeared at the annual tax sale, the property was forfeited on March 10, 1966, to the State of Illinois. (Ill. Rev. Stat. 1965, ch. 120, par. 727.) On June 22, 1966, the appellant purchased the lots in question pursuant to section 272 of the Revenue Act (Ill. Rev. Stat. 1965, ch. 120, par. 753), and certificates of purchase in amounts of $900.30 and $1,525.69 were issued. An eminent domain petition was filed by the city of Chicago on May 3, 1968, and judgment for the petitioner was entered on September 9, 1968. The amount of the award was deposited with the county treasurer on September 12, 1968. As extended, the period of redemption expired on October 9, 1968. The circuit court dismissed the tax purchaser's application for a tax deed under section 266 of the Revenue Act (Ill. Rev. Stat. 1965, ch. 120, par. 747), and directed that the sum of $5,242.38, the amount necessary to redeem, be disbursed to the tax purchaser.

(Supreme Court Opinion)

The parties agree that the issue presented is one of first impression.

The tax purchaser's contention that it is entitled to the entire award is based primarily upon the language of section 266 of the Revenue Act which provides: "If the time of redemption expires and the real estate has not been redeemed from the sale and all taxes and special assessments which became due and payable subsequent to the sale have been paid and all forfeitures and sales which occur subsequent to the sale have been redeemed and the notices required by law have been given and the petitioner has complied with all the provisions of law entitling him to a deed, the court shall so find and shall enter an order directing the county clerk on the production of the certificate of purchase and a certified copy of said order, to issue to the purchaser or his assignee a tax deed." (Ill. Rev. Stat. 1965, ch. 120, par. 747.) Emphasizing that the statute provides that the court *"shall"* order the issuance of a deed, the tax purchaser argues, "Proper statutory construction of section 266 would mean that such a deed then passes title to any eminent domain award which stands as a substitute for the property."

The difficulty with this contention is that a tax deed is intended to convey title to the real estate involved. Section 266 of the Revenue Act expressly provides: "This section shall be liberally construed so that tax deeds herein provided for shall convey merchantable title." That section also provides: "The court may, and upon application therefor shall, issue a writ of assistance to put the grantee in possession of the real estate and may enter such orders and issue such writs as may be necessary or desirable to maintain the grantee in possession of the real estate." Ill. Rev. Stat. 1967, ch. 120, par. 747.

(Supreme Court Opinion)

After an eminent domain proceeding has been completed and the award deposited with the country treasurer it is impossible for a tax deed to convey merchantable title. It is also impossible for the tax purchaser or his assignee to be put in possession of the property. The completion of the eminent domain proceeding thus of necessity terminates the right of the tax buyer to receive a tax deed. (See *Chicago Land Clearance Com. v. Narodski*, 57 Ill. App. 2d 302, 305, n. 2.) Similarly, the completion of the eminent domain proceeding makes it impossible for the owner of the tax delinquent property to effect a redemption from the tax sale in the manner contemplated by the statute. The statute contemplates that a redemption from the sale will free the property from the lien of the tax sale certificate and restore to him the title which he previously had.

It is therefore clear that the decision of the trial court which returned to the tax purchaser the amount to which he was entitled, but dismissed his petition for a deed, was correct under the law as it existed when the order appealed from was entered.

The tax purchaser, however, has directed our attention to Senate Bill 1173 which was approved June 25, 1970, after this case had been submitted for decision. That amendment to section 266 of the Revenue Act provides: "In the event such real estate has been taken pursuant to the provisions of 'An Act to provide for the exercise of the right of eminent domain', approved April 10, 1872, as now or hereafter amended, the tax purchaser shall be entitled to the award which is the substitute for such real estate. This definition providing that eminent domain awards are to be substituted in lieu of the property and that tax deeds shall apply to such award shall be con-

strued as declaratory of the existing law and not as a new enactment."

With respect to this enactment the tax purchaser contends: "It leaves no question but that the tax purchaser is entitled to the eminent domain award which stands in lieu of the property. Since this current legislative enactment makes it clear that it is not a new enactment, this should put to rest all argument in this case and clearly indicate the trial court's order was erroneous." We cannot accept this contention.

The first sentence of the amendment relied upon provides that a tax purchaser is always entitled to an entire eminent domain award, even though the period of redemption has not expired when the eminent domain proceeding is completed. In our opinion this provision is clearly unconstitutional. It means that those owners whose property is not taken by eminent domain would be entitled to redeem from a tax sale during the statutory period of redemption, which those owners whose property happens to be taken for public use by eminent domain would have no right to redeem. There is no rational ground to support a provision which makes the relative rights of the tax purchaser and of the owner of the property depend upon the fortuitous circumstances that the property which was the subject of the tax sale has been acquired by a public agency in the exercise of the power of eminent domain.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX "B"

Opinion and Judgment of the Circuit Court of Cook County

IN THE MATTER OF THE APPLICATION OF THE COUNTY TREASURER, etc.
Petition of DELANO, INC.
for a Tax Deed.

No. 68 Co TD 209

ORDER

This Cause coming before me on set hearing, this Court having heard argument of counsel,

It Is Hereby Ordered as follows:

1. The motion of Edward V. Hanrahan, State's Attorney of Cook County, Illinois, to reconsider this Court's order of December 27, 1968, expunging an alleged redemption hereinbefore made, is herewith denied and said order of December 27, 1968 is found in full force and effect.

2. The Court finds that the City of Chicago instituted eminent domain proceedings; that prior to the expiration of the period of redemption, the award for said eminent domain proceedings was deposited with the County Treasurer of Cook County, Illinois; and that by reason thereof, the tax buyer is no longer entitled to secure a tax deed. Accordingly, the motion of Walter C. Arnold to dismiss the petition for tax deed is hereby sustained.

3. Edmund J. Kucharski, County Treasurer of Cook County, Illinois, is herewith ordered to pay to Delano, Inc. from the award the sum of $5,242.38 upon surrender

of tax sale certificates Numbers F 25067 and 25068, in full payment of the amounts due thereon. Said sum is currently held by the County Clerk and is ordered returned to the County Treasurer by this Court's order of December 27, 1968.

4. This Court expressly finds that there is no just reason for delaying the enforcement or appeal of this order.

Dated: June 3, 1969.

Enter:

/s/ Helen T. McGillicuddy
Judge

APPENDIX "G"

Pertinent Portion of the Constitution of the United States

Article I

Section 10. No State shall enter into any Treaty Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Section 253 of the Illinois Revenue Act (Ill. Rev. Stat., 1967, Chap. 120, Par. 734)

REDEMPTIONS

734. *Time and conditions of redemption.*] § 253. Real property sold under the provisions of this Act may be redeemed at any time before the expiration of 2 years from the date of sale, by payment in legal money of the United States to the county clerk of the proper county, the amount for which the same was sold, together with the amount of the penalty bid at such sale, unless the property has been purchased pursuant to Section 272 of this Act, in which event the penalty bid shall be 12%, if redeemed at any time before the expiration of 6 months from the day of sale; if between 6 and 12 months, the amount for which the same was sold, together with twice the amount of the penalty bid; if between 12 and 18 months, the amount for which the same was sold; together with 3 times the amount of the penalty bid; if between 18 months and 2 years, the amount for which the same was sold, together with 4 times the amount of the penalty bid at said sale. The person redeeming

(Statutes Involved)

shall also pay the amount of all taxes and special assessments accruing after such sale with 7% penalty thereon, for each year or portion thereof intervening between the time of the payment of the subsequent tax or special assessment and the time of redemption, in all cases where the purchaser at the tax sale, or his assignee, pays such subsequent tax or special assessment after it has become delinquent or, after the holder of the certificate of purchase has filed a petition for a tax deed pursuant to Section 266 of this Act; also, all fees paid to the registrar of titles of the proper county incident to registering tax certificates in compliance with "An Act concerning land titles," approved May 1, 1897, as heretofore and hereafter amended, and it is the duty of the county clerk to include in the certificate of redemption the amount of the subsequent taxes, special assessments and fees of the registrar of titles paid by the purchaser or holder of the tax certificates: Provided, however, that the county clerk shall not be required to include any subsequent taxes, special assessments or fees of the registrar of titles in his certificate of redemption, nor shall the payment thereof or a charge upon the land sold for taxes, unless the purchaser, assignee, or holder of the tax certificate of sale shall have filed and have posted by the county clerk on the tax judgment, sale, redemption and forfeiture record, before redemption, an official, original or duplicate receipt for the payment of such subsequent taxes, special assessments or fees of the registar of titles, and it shall be the duty of the tax collector and registrar of titles to furnish such duplicate receipts. The person redeeming shall also pay all costs and expenses of receivership pursuant to Section 253a of this Act to the extent that such costs and expenses exceed any income from the property in question, provided such costs and expenditures have been approved by the court appointing such receiver and provided that a certified copy of such

order of approval is filed and posted by the county clerk on the tax judgment, sale, redemption and forfeiture record before redemption. In the event that income should exceed expenditures, such net income is to be deposited with the clerk of the court ordering the tax sale and shall be distributed upon court order to the owner or owners of the property in question in the proportions as determined by said court.

In the event that the property in question shall not be redeemed, no deficiency judgment shall be taken on account of said receivership proceedings, against the owner or owners of the property.

Such real property may also be redeemed after the expiration of 2 years from the date of sale, until expiration of the extended period of redemption, by payment in legal money of the United States to the county clerk, of the amount for which the said property was sold, the penalties provided herein for the 2 years after sale together with interest thereafter at 6% per annum on the face amount of such tax sales, and subsequent taxes, special assessments, fees of the registrar of titles and costs and expenses of receivership paid by the purchaser as herein provided, and advertising fees and $5 costs. Tenants in common or joint tenants shall be allowed to redeem their individual interests in real property sold under the provisions of this Act in the same manner and under the terms specified in this Section for the redemption of other real property; any redemption made shall inure to the benefit of the person having the legal or equitable title to the property redeemed, subject to the right of the person making the same to be reimbursed by the person benefited. As amended by act approved July 26, 1967. L. 1967, p. ....., S.B. No. 472.

(Statutes Involved)

Section 266 of the Illinois Revenue Act (Ill. Rev. Stat., 1967, Chap. 120, Par. 747)

747. *Petition for issuance of tax deed—Filing fee—Notice—Order—Writ of assistance—Appeal—Liberal construction.*] § 266. At any time within 5 months prior to the expiration of the time of redemption from the sale of any real estate for non-payment of taxes or special assessments, pursuant to judgment and order of sale on the County Collector's application for judgment and order of sale under the provisions of Section 225 of this Act, as amended, the purchaser or his assignee may file a petition in the circuit court in the same proceeding wherein the judgment of sale was entered upon which the sale was had, praying that the court direct the county clerk to issue a tax deed if the real estate is not redeemed from the sale. Such petition shall be accompanied by a filing fee of $15.00. Notice of the fact of filing the petition and the date on which the petitioner intends to make application for an order on the petition that a deed issue if the real estate is not redeemed from the sale shall be given to occupants, owners and persons interested in the real estate in the same manner as provided in Section 263, except that only one publication shall be required. The notice to occupants and the notice by publication shall be given not less than 3 months prior to the date fixed for making application that a deed issue. The purchaser or his assignee may, if he desires, insert in the notice or notices required by Section 263 the fact of filing the petition for a tax deed and the date on which he intends to apply in the circuit court for an order for a deed if the real estate is not redeemed from the sale, in which case the notice provided by this section shall not be required. The county clerk shall be notified of the filing of the petition and any person owning or interested in the real estate may, if he desires, appear in the proceeding. If the time of redemption expires and the real estate has not been redeemed from the sale and all taxes and special assess-

ments which became due and payable subsequent to the sale have been paid and all forfeitures and sales which occur subsequent to the sale have been redeemed and the notices required by law have been given and the petitioner has complied with all the provisions of law entitling him to a deed, the court shall so find and shall enter an order directing the county clerk on the production of the certificate of purchase and a certified copy of said order, to issue to the purchaser or his assignee a tax deed. However, the court shall insist on strict proof of notice and, in the event due diligence is claimed, shall inquires into the facts of diligence, and shall require further that the evidence relative thereto be transcribed in all cases including default matters, and such transcript shall be made a part of this court order. If the court refuses to enter an order directing the county clerk to execute and deliver the tax deed, because of the failure of the purchaser to fulfill any of the above provisions, it shall order the return of the purchase price forthwith as in case of sales in error in all cases where the purchaser or his assignee has made a bona fide attempt to comply with the statutory requirements for the issuance of the tax deed. The court may, and upon application therefor shall, issue a writ of assistance to put the grantee in possession of the real estate and may enter such orders and issue such writs as may be necessary or desirable to maintain the grantee in possession of the real estate. Tax deeds issued pursuant to this Section are incontestable except by appeal from the order of the court directing the county clerk to issue the tax deed. However, relief from such order may be had under Section 72 of the "Civil Practice Act", approved June 23, 1933, as heretofore or hereafter amended, in the same manner, upon the same grounds and to the same extent as may be had under that Section with respect to final orders, judgments and decrees in other

(Statutes Involved)

proceedings and the court shall consider defenses relating to questions of the notices required by Section 263 and the proof presented in the hearing required by this Section. This Section shall be liberally construed so that tax deeds herein provided for shall convey merchantable title. Tax deeds issued pursuant to this Section are subject to Section 266b of this Act. As amended by act approved July 26, 1967. L. 1967, p. ....., S.B. No. 472.

APPENDIX "D"

Order of the Illinois Supreme Court Denying a Petition for Rehearing

BE IT REMEMBERED, that, to-wit: on the 3rd day of December, A.D. 1970, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

DELANO, INC.,
Appellant

No. 42929 vs.

WALTER C. ARNOLD,
Appellee

} Appeal from Circuit Court Cook County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

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Supreme Court, U.S.
FILED
FEB 16 1971
E. ROBERT SEAVER, CLERK

No. 1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

DELANO, INC.,

Petitioner,

vs.

WALTER C. ARNOLD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF RESPONDENT, WALTER C. ARNOLD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE CHURCHILL-BLAKELY PRINTING COMPANY, CHICAGO

Authorities Cited.

Cases.

	Page
Chicago Land Clearance Commission v. Navratski, 57 Ill. App. 2d 302, 207 N. E. 2d 81 (1965)	1a
In re County of Nassau, 34 N. Y. 2d 621, 249 N. E. 2d 426 (N. Y. C. A., 1969)	3
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Tubbs v. Dunlop, 325 Ill. App. 53, 59 N. E. 2d 514 (1945)	1a
United States v. Certain Lands in Town of Hempstead, 129 F. 2d 918 (2d Cir., 1942)	3
Weber v. Wells, 154 F. 2d 1004 (9th Cir., 1946)	3

Constitution and Statutes.

Art. I, § 10 of the Constitution of the United States	2
Section 270 of the Illinois Revenue Act (Ill. Rev. Stats., Ch. 120, § 751)	2, 1a

IN THE

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OCTOBER TERM, 1970

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DELANO, INC.,

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vs.

WALTER C. ARNOLD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF IN OPPOSITION.

Respondent Arnold owned land in Chicago which in June, 1966 was sold to Petitioner for $2,425.99 for unpaid taxes. Under Illinois law the period of redemption, as extended, did not expire until October 9, 1968. On May 3, 1968 the City of Chicago filed eminent domain proceedings against the property, making both Arnold and the Petitioner parties defendant thereto.

On September 9, 1968 a judgment was entered in the condemnation proceeding for $17,600, which amount was deposited by the City of Chicago with the County Treasurer on September 12, 1968. The County Treasurer, on October 9, 1968, delivered its check to the County Clerk for $5,242.38 to reimburse Petitioner in full for its interest

in the property. Said amount was based on the County Clerk's estimate of the amount required to redeem as provided in Ill. Rev. Stat. Chapter 120 § 751 (See Respondent's Appendix A). This amount is more than double the amount paid at the tax sale as it included interest, penalties and costs.

Petitioner here claims that the failure to award him the entire $17,600 was a violation of the constitutional provision prohibiting any state from passing any law "impairing the Obligations of Contract" (Art. I, § 10).

1. The Illinois legislature did not pass any statute narrowing Petitioner's right after the Petitioner's purchase at the tax sale in 1966. The Illinois Supreme Court, in the instant case, has construed the Illinois statutes, which were in effect prior to 1966, as not requiring the original owner or other interested party to go through the futile motion of redeeming property after it has been taken by a public body in eminent domain. Since the statutory right of redemption is cut off by the condemnation, it was reasonable to construe Illinois statutes regulating the tax titles, tax redemptions, and eminent domain proceedings in combination as allowing the tax purchaser in such circumstances the amount to which he would have been entitled if the owner had redeemed the property, leaving the remainder to the owner. This is likewise the purport and intention of Section 270 of the Illinois Revenue Act (Ill. Rev. Stats., Ch. 120, § 751), the pertinent part of which is attached hereto as Respondent's Appendix A.

The Petitioner, like any owner or mortgagee, acquired and held its interest subject to the possibility that it might be cut off by eminent domain proceedings, so long as Petitioner received just compensation for its interest in the property out of the award. Petitioner clearly took the risk that the Illinois statutes would be given this reasonable

construction,[1] as had the statutes of New York and California. (See *infra*).

2. Petitioner asserts a conflict between the instant decision and the decision of the Ninth Circuit in *Weber* v. *Wells*, 154 F. 2d 1004 (9th Cir., 1946), on the one hand, and the decision of the Second Circuit in *United States* v. *Certain Lands in Town of Hempstead*, 129 F. 2d 918 (2d Cir., 1942). However, each of those cases merely interpreted the statutes of the particular state involved; none of them purported to pass upon a federal constitutional question.

The *Weber* case distinguished *Hempstead* on the ground that the Second Circuit Court of Appeals

> ". . . had occasion to construe certain statutes of the state of New York. In the instant case we are governed by applicable California statutes. We are not persuaded that the statutes under consideration in the *Hempstead* case, *supra*, and the governing California statutes in the instant case require the same interpretation."

Furthermore, the *Hempstead* decision has been repudiated by the New York courts as an interpretation of New York law, explicitly in *Knocklong Corp.* v. *Seaman*, 6 N. Y. Misc. 2d 895, 162 N. Y. Supp. 2d 71 (Sup. Ct., Nassau County, 1957), which case is cited with approval on this point by the New York Court of Appeals in *In re County of Nassau*, 24 N. Y. 2d 621, 249 N. E. 2d 426, 428 (1969). The New York law, as stated in the latter case, is that (249 N. E. 2d at 428):

> ". . . Appellants' tax lien was, therefore, extinguished by the taking of the subject property in emi-

1. Mr. Justice Schaefer's opinion notes that "the issue presented is one of first impression" in Illinois (Pet. 2a).

> nent domain, but substituted in its place was an equitable lien on the proceeds of the condemnation award to the extent of the tax lien and interest thereon. . . ."

This is what the Supreme Court of Illinois held to be the law of Illinois in the case at bar.

The decision below presents no federal constitutional question, and there is no conflict of decisions on the constitutional issue which the petitioner seeks to raise. The petition for certiorari should therefore be denied.

Respectfully submitted,

SHERWOOD K. PLATT,
ROBERT L. STERN,
DAVID S. K. PLATT,
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Of Counsel.

APPENDIX A.

Pertinent portion of Section 270 of the Illinois Revenue Act (Illinois Revised Statutes, Ch. 120, § 751):

"No final judgment or decree of court in any case either at law or in equity or in proceedings under the Eminent Domain Act involving the title to or interest in land in which such party holding such tax deed* shall have an interest or setting aside any tax deed* procured under this Act shall be entered until the claimant shall make *reimbursement to the party holding such tax deed** and payments as herein provided in so far as it shall appear that the holder of such deed or his assignors shall have properly paid or be entitled to in procuring such deed. The county clerk is entitled to a fee of $10 for preparing the *estimate of the amount required to redeem,* and such estimate of the county clerk is prima facie evidence in all courts of the amounts due the tax title holder." (Emphasis supplied.)

* Construed to include tax sales certificates as well as tax deeds. *Tubbs* v. *Dunlop,* 325 Ill. App. 53, 59 N. E. 2d 514 (1945), *Chicago Land Clearance Commission* v. *Narodski,* 57 Ill. App. 2d 302, 307, 207 N. E. 2d 81 (1965).

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OCTOBER TERM, 1970

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DELANO, INC.,

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vs.

WALTER C. ARNOLD,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

REPLY TO THE BRIEF OF RESPONDENT, WALTER C. ARNOLD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1970

No. 1268

DELANO, INC.,

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On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

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Respondent's brief is replete with inaccuracies.

In stating the alleged "facts", respondent claims both that a redemption was made on October 9, 1968 (within the time provided by statute) and that this amount was more than double petitioner's investment. Both assertions are untrue.

On October 9, 1968, the last day in which redemption could be made, (*Petition of Short*, 99 Ill. App. 2d 143, 241 N.E. 2d 216, 217), attorney for respondent attempted to redeem with a post-dated check. The trial court held that there was no redemption and that respondent's act of tendering a post-dated check was a nullity. No cross-appeal was taken from this portion of the trial court's order. Respondent's attempt to now assert as a fact that he redeemed within the redemption period should cause this court to examine his brief with a jaundiced eye.

Moreover, respondent states that the amount necessary to redeem was $5,262.38 although the amount originally bid at the sale for nonpayment of taxes was $2,425.99: respondent has attempted to create the impression that petitioner is doubling his money.

Again this is not factually accurate. Respondent has neglected to state to the court that in addition to the amount petitioner bid at the sale for nonpayment of taxes (which included taxes for several years) that petitioner also paid taxes for several subsequent years and advanced costs for filing the court suit and publication.

Since petitioner's advances for attorneys' fees, title searches and the cost of serving statutory notices are totally unreimbursed, its return on its investment would have been modest even if redemption had been made.

This is totally inapposite to the false impression respondent has attempted to create.

Basically respondent contends that petitioner acquired and held its interest subject to the possibility of eminent domain proceedings. Although this is true, the eminent domain proceedings affects the rights of the parties only

so far as is necessary to assure the sovereign's title. It does not affect the rights of the parties as between themselves. (*Forbis v. C. W. Hunter Co.*, (1939) 372 F. 2d 388, 391) Accordingly, the eminent domain proceedings, a legislative action, cannot change the rules in the middle of the game.

Since, as is pointed out in pages 9 through 11 of petitioner's original brief, it acquired certain vested rights at the time it made its purchase, those rights cannot be changed by subsequent legislative action, or in the instant case, by eminent domain proceedings.

In an effort to avoid this clear rule of law, respondent attempts to imply that because the Illinois legislature did not pass any statute narrowing the petitioner's rights there is no constitutional violation. However, in reaching this erroneous conclusion, respondent has totally ignored that portion of petitioner's original brief (pp. 7-9) which shows that eminent domain actions are legislative actions (*City of Chicago v. Pecarro*, 408 Ill. 387, 97 N.E. 2d 766, 771; *Forest Preserve of Cook County v. Wilke*, 3 Ill. 2d 49, 119 N.E. 2d 734, 737; *City of Chicago v. Albert J. Schorsch Realty Company*, ___ Ill. App. 2d ____, 261 N.E. 2d 711, 715). The failure of respondent to in any way contest this point is a tacit admission that the eminent domain action in the instant case was in fact a legislative action and subject to the constitutional proscription involved.

Respondent would also have this court believe that at Section 270 of the Illinois Revenue Act (Ill. Rev. Stat., Chap. 120, par. 751) was designed for the purpose of circumventing the strict redemption requirements under Section 263 of the Illinois Revenue Act as set forth in the petition for certiorari (pp. 10-11).

Section 270 of the Illinois Revenue Act is solely applicable to those situations where the tax deed or the tax sale certificate is imperfect and the court, in a collateral proceeding, is setting the deed or certificate aside. This section has nothing to do with the issues involved in this case and is not a substitute for those strict redemption requirements set forth in Section 263 of the Illinois Revenue Act. Moreover, the Illinois Supreme Court neither bases its decision on the section nor otherwise refers to it.

The opinion of the Illinois Supreme Court in the instant case effectively repudiates prior opinions of this court and violates petitioner's constitutional rights. It is therefore respectfully submitted that this court grant certiorari as prayed for in petitioner's original brief.

Respectfully submitted,

ALLAN L. BLAM
Attorney for Petitioner